ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998, S.O. 1998*, c. 15 (Sched. B), as amended (the OEB Act);

AND IN THE MATTER OF an Application by EPCOR Natural Gas Limited Partnership pursuant to section 36(1) of the OEB Act for an order or orders approving or fixing just and reasonable rates and other charges for the sale and distribution of gas to be effective January 1, 2023 for the EPCOR Natural Gas Limited Partnership gas distribution system to serve the Municipality of Arran-Elderslie, the Municipality of Kincardine and the Township of Huron-Kinloss.

EPCOR NATURAL GAS LIMITED PARTNERSHIP

REPLY ARGUMENT

PHASE 2 - CUSTOMER VOLUME VARIANCE ACCOUNT

A. INTRODUCTION

1. On January 9, 2023, EPCOR Natural Gas Limited Partnership (EPCOR) filed its Argument in Chief setting out why the Ontario Energy Board (OEB) should approve the Customer Volume Variance Account (CVVA), including the ability to record costs in this account effective January 1, 2021.[1] The proposed CVVA will record utility revenue shortfalls due to the variance between: (a) customer volumes currently in rates based on the Board-approved CIP (defined below); and (b) actual volumes for Rates 1 and 6 customers.

2. EPCOR explained that the CVVA is necessary to uphold the ten-year regulatory compact that was the outcome of a highly regulated, competitive process and established a risk allocation framework upon which the utility based its commitment to serve the South Bruce communities. This competitive process involved the development of common infrastructure plan applications (CIP), which detailed a proponent's revenue requirement and consisted of

[1] EPCOR had initially requested the ability to record costs in the CVVA effective January 1, 2020. However, in EPCOR's response to OEB Staff 4 (a) filed December 5, 2022 at p.8, the utility clarified that EPCOR is proposing an effective date for the CVVA of January 1, 2021.

general parameters including common assumptions (for which the utilities did not assume risk) as well as competitive parameters (for which the preferred utility assumed full risk). Average volumes for Rate 1 and 6 customers was a common assumption in the CIP for which the risk would be borne exclusively by ratepayers for the entire ten-year rate stability period. Furthermore, at the conclusion of the competitive process, the OEB was clear that resulting distribution rates must be consistent with the commitments in the approved CIP.[2]

3. EPCOR highlighted that the proposed CVVA will (a) restore and fully implement the utility-customer risk allocation framework which was previously approved by the OEB during the competitive process; and (b) enable EPCOR to earn a reasonable return on its investment, consistent with its approved revenue requirement and thereby avoid a scenario of chronic under-earning and ultimately a negative cumulative return on equity.

4. Three parties including OEB Staff, the Vulnerable Energy Consumers Coalition (VECC) and School Energy Coalition (SEC) filed submissions in response to EPCOR's Argument in Chief. This Reply Argument sets out EPCOR's response to those submissions. EPCOR will not repeat its Argument in Chief, but continues to rely on the positions and arguments it has already submitted. As there were a number of arguments received from the other parties, EPCOR will not respond to every item noted. However, failure to respond to any particular items should not be interpreted as acceptance or agreement by EPCOR.

5. Notably, OEB Staff agrees that the OEB should approve the establishment of the CVVA for substantially similar reasons set out by EPCOR.[3] There is agreement that forecast Rate 1 and 6 customer volumes are common assumptions in the CIP and that had Enbridge Gas been the successful proponent, its existing Normalized Average Consumption Variance Account (NAC) account would have likely captured the same type of volume variances that EPCOR intends to record in the CVVA.[4] Where EPCOR and OEB Staff disagree is with respect to: (i) the effective date of the CVVA, (ii) whether EPCOR should be required to share in the risk of revenue variances resulting from the difference between forecasted and

[2] Southern Bruce Expansion Applications, Decision and Order, April 12, 2018, Section 4.2 Assessment of CIP Proposals, p. 11, EB-2016-0137/EB-2016-0138/EB-2016-0139.
[3] OEB Staff Submission, January 26, 2023, p. 3.
[4] OEB Staff Submission, January 26, 2023, p. 5.

actual average customer volume and (iii) the applicability of the CVVA to any community expansions of the South Bruce utility during the rate stability period.

6. In this Reply Argument, EPCOR responds to these three areas of disagreement and in doing so, will also address certain comments made by VECC and SEC in so far as they relate to these issues. EPCOR will generally address the issue of a rate smoothing proposal for disposition of the CVVA as well as prospective customer communications following the outcome of this proceeding.

7. Finally, there is no dispute regarding the proposed methodology for calculating balances in the CVVA, which is set out in EPCOR's additional evidence filed in this proceeding.[5] OEB Staff has reviewed the proposed methodology and has no concerns.[6] Likewise, SEC has stated that it does not oppose the methodology.[7]

B. AN EFFECTIVE DATE OF JANUARY 1, 2021 IS PERMISSIBLE AND APPROPRIATE

8. As part of this Application, EPCOR has requested an effective date of January 1, 2020 for the CVVA.[8] In response, OEB Staff submitted that the CVVA should have an effective date of January 1, 2023.[9] OEB Staff, SEC and VECC have all indicated that an effective date prior to January 1, 2023 would constitute retroactive ratemaking.[10] For the reasons that follow, EPCOR submits its proposed effective date of January 1, 2021 for the CVVA is both permissible and appropriate when considering retroactive rate making principles.

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[5] EPCOR Additional Evidence, November 14, 2022, Appendix A.
[6] OEB Staff Submission, January 26, 2023, p. 10.
[7] SEC Submission, January 27, 2023, p. 7.
[8] Although in the original application, EPCOR requested an effective date of January 1, 2020 for the CVVA, EPCOR has amended the effective date to January 1, 2021. See EPCOR Argument in Chief, January 9, 2023, p 9, para 28.
[9] OEB Staff Submission, January 26, 2023, p 6.
[10] OEB Staff Submission, January 26, 2023, p 6; SEC Argument, January 27, 2023, p 6; VECC Argument, January 27, 2023, p 9-10, paras 33-34.

i) Presumption Against Retroactive Ratemaking

9. OEB Staff state that it is a well-established principle that a regulatory tribunal exercising rate-making authority must do so on a prospective basis absent express statutory authorization.[11] While EPCOR agrees that there is a general presumption against retroactive ratemaking, EPCOR notes that the OEB Act, like most public utility statutes, does not expressly prohibit retroactive ratemaking. In contrast, the OEB Act gives the OEB a broad mandate to "make orders approving or fixing just and reasonable rates"[12] and in doing so, "adopt any method or technique that it considers appropriate".[13]

10. Rates must be just and reasonable from two perspectives – the perspective of the consumer and the perspective of the public utility. Ontario courts have confirmed that "just and reasonable rates" are rates that permit a utility to recover its prudently incurred costs and earn a fair return on invested capital.[14]

11. EPCOR has been materially under-earning since January 1, 2020.[15] Consequently, an OEB finding denying EPCOR's proposed CVVA effective date of January 1, 2021 would amount to the imposition of rates that prevent EPCOR from earning a fair return on its invested capital – i.e., rates that do not meet the requisite "just and reasonable" statutory standard. Moreover, there is no statutory mandate that compels the OEB to deny EPCOR's request.

12. In *Capital Power Corp. v. Alberta Utilities Commission* ("*Capital Power*"),[16] the Alberta Court of Appeal explained that "the reason there is no blanket prohibition against retroactive ratemaking is that there are decades of public utility board and judicial decisions variously

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[11] OEB Staff Submission, January 26, 2023, p 6 citing *Union Gas Ltd. v. Ontario (Energy Board)*, 2015 ONCA 453, para. 82. See also, *ATCO Gas, Re,* 2010 ABCA 132 at para 46 citing *Coseka Resources Ltd. v. Saratoga Processing Co.* (1980), 31 A.R. 541 (Alta. C.A.) at para. 29, (1980), 16 Alta. L.R. (2d) 60 (Alta. C.A.) and *Northwestern Utilities Ltd., Re* (1978), [1979] 1 S.C.R. 684 (S.C.C.), at 691 and 699.
[12] *Ontario Energy Board Act*, SO 1998, c 15, s 36(2).
[13] *Ontario Energy Board Act*, SO 1998, c 15, s 36(3).
[14] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, p 8, para 25 citing *Power Workers' Union, Canadian Union of Public Employees, Local 1000* v. *Ontario (Energy Board),* 2013 ONCA 359, 116 O.R. (3d) 793, at paras. 13, 30-32, leave to appeal to S.C.C. granted, [2013] S.C.C.A. No. 339, appeal heard and reserved December 3, 2014; *Northwestern Utilities Ltd. v. Edmonton* (City) , [1929] S.C.R. 186, pp. 192-3.
[15] See EPCOR Argument in Chief, January 9, 2023, p 4 where EPCOR states at footnote 4 that "[i]n the year 2020, EPCOR incurred a loss of $2,144,240."
[16] 2018 ABCA 437.

applying the rule or declining to apply the rule depending on circumstances"[17] (emphasis added). The Court went on to state that "no court or public utilities board will ever be able to define precisely the circumstances in which retroactive ratemaking is permissible. Nor is it desirable that they should do so. And, presumably, it has been deemed even less desirable to enact a blanket prohibition."[18]

13. *Capital Power* suggests that, instead of being bound by a blanket ban on retroactive ratemaking, a regulator exercising ratemaking authority should instead consider whether, in the specific circumstances, and in light of the regulatory principles such as fairness, equity, encouraging efficiencies and a competitive market, retroactive rate making is in the public interest.[19]

14. Notwithstanding the fact that a CVVA effective date of January 1, 2023 would result in a revenue shortfall of approximately $0.52M[20], none of OEB Staff, SEC or VECC address or adequately explain why the particular circumstances in this case warrant imposing this shortfall on the utility.

15. EPCOR submits that the unique circumstances with the provision of gas distribution services in South Bruce strongly favour a CVVA effective date of January 1, 2021.

16. The entire approach to system expansion and rate-setting in South Bruce has been unique – the outcome of an OEB-driven competitive process for the right to serve the region, based on competing 10-year revenue requirement proposals. A key rationale for the approach was the ability to harness the competitive aspect of the process to bring cost discipline to the system build-out, for the benefit of prospective ratepayers. In order to set a level playing-field for the competition, the Board convened a proceeding that defined which revenue requirement elements would be subject to competition and which would not. It was determined by the Board that average annual consumption would be a non-competitive element. It was on that

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[17] *Capital Power Corp. v. Alberta Utilities Commission* 2018 ABCA 437 at para 64.
[18] *Capital Power Corp. v. Alberta Utilities Commission* 2018 ABCA 437 at para 64.
[19] See *Capital Power Corp. v. Alberta Utilities Commission* 2018 ABCA 437 at paras 66-67.
[20] See EPCOR's Responses to Additional Interrogatories for Phase 2 – CVVA, December 5, 2022, Excel Workbook of CVVA balances.

basis that EPCOR prepared, submitted and was ultimately successful with, its 10-year proposal to serve South Bruce. The position of OEB Staff, SEC and VECC effectively ignores all of this context underpinning EPCOR's proposal in this proceeding.

17. South Bruce ratepayers have reaped the rewards of the competitive aspects of the OEB's competitive process – by avoiding capital cost overruns and customer attachment risk.[21] EPCOR has accepted the full responsibility of these risks – in line with the assumptions and determinations in the Board's competitive process. All that EPCOR is asking is for that same principle to apply and have ratepayers assume the full responsibility of the risk associated with annual average consumption. That, in EPCOR's view, is fair.

18. In addition, this is in essence a new gas utility entrant into Ontario serving a previously unserved area, with future expansions possible (and planned). It does not make sense to put this utility at a financial disadvantage at an early stage in the life of the utility. Facilitating the maintenance of a financially viable gas industry for the distribution of gas is a statutory objective of the Board. The public interest in EPCOR's ability to realize a fair and reasonable return on its investment and continue to provide safe, reliable utility services to consumers should outweigh any assumed presumption of prospective rate making. An OEB finding to the contrary would discourage investment in essential utility services being provided to consumers.

ii) Exceptions to the Presumption Against Retroactive Ratemaking

19. Notwithstanding the Court's findings in *Capital Power*, other courts and tribunals have discussed specific exceptions to the presumption against retroactive rate making, as set out below.

20. In their submissions in response to EPCOR's Argument in Chief, OEB Staff and SEC referred to two exceptions to the rule against retroactive ratemaking under which the OEB has the authority to consider retroactive adjustments to rates: (1) where there are interim rates and (2) where certain costs have been recorded in a deferral and variance account.[22] OEB Staff

[21] EPCOR South Bruce – 2023 IRM Application, July 18, 2022, Table 1.2 CIP Competitive Parameters, p. 26.
[22] OEB Staff Submission, January 26, 2023, p 6; SEC Argument, January 27, 2023, p 6.

and SEC submitted that neither of the exceptions apply to EPCOR's proposed effective date for the CVVA because EPCOR's current rates are final not interim, and EPCOR does not have a current CVVA.[23] VECC's argument focused solely on the fact the EPCOR's rates are not interim and therefore cannot be applied retroactively.

21. Several decisions have been critical of an overreliance on the interim rates and DVA exceptions. In *Union Gas,* the Ontario Court of Appeal, quoting the Alberta Court of Appeal in *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)* ("*Atco*"),[24] stated "[s]lavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments" in a proper case.[25]

22. The Court in *Union Gas* further stated that ""[s]imply because a ratemaking decision has an impact on a past rate does not mean it is an impermissible retroactive decision". The critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge [that the rates were subject to change]".[26]

23. The Alberta Court of Appeal in *Atco* also noted that it is not interim rates that are important per se, "[a]ccording to the Supreme Court of Canada in *Bell Canada 1989* at 1756, alteration of an interim rate by a regulator is simply a function of regulators who have the mandate to ensure rates and tariffs are, at all times, just and reasonable."[27] In *Atco*, although there was no discussion of interim rates or deferral accounts, the Court found that Atco knew that certain assets were not being used or required for operations and was therefore aware that its revenue requirement would change as a result of removal of its assets.[28]

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[23] OEB Staff Submission, January 26, 2023, p 6; SEC Argument, January 27, 2023, p 6.
[24] 2014 ABCA 28, 566 A.R. 323.
[25] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, p 28, para 91 citing *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28, 566 A.R. 323 at para 62.
[26] *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, p 28, para 91 citing *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28, 566 A.R. 323 at para 56; see also EPCOR Energy Alberta GP Inc. 2021-2022 Non-Energy Regulated Rate Tariff Application (AUC Decision 26694-D01-2022) at para 42.
[27] *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28, 566 A.R. 323 at para 58.
[28] *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2014 ABCA 28, 566 A.R. 323 at para 61-62.

24. In support of its argument that EPCOR's rates cannot be applied retroactively, SEC relies on the OEB decision in *Halton Hills Hydro Inc*. ("*Halton Hills*")[29] where the OEB denied retroactive application of a new DVA account. SEC referred to the OEB's finding there that "the rule against rate retroactivity is not discretionary other than for a narrow set of exceptions."[30] SEC also noted that the OEB dismissed the idea of knowledge being the critical factor if a retroactive adjustment is permissible, on the basis that it had not previously established an expectation that the historical rates in question could be subject to change.[31] On this basis, SEC argued that the OEB has not, with respect to the present Application, established an expectation to customers that EPCOR's rates have been anything but final.[32] EPCOR disagrees, and believes the *Halton Hills* decision on the retroactivity point is distinguishable.

25. In *Halton Hills,* Halton Hills Hydro ("HH") requested approval from the OEB to establish a DVA to annually record an adjustment to its revenue requirement. The annual amount related to an error HH identified in the calculation of depreciation expense in its last cost of service application.[33] The DVA was unanimously opposed by OEB Staff, SEC and VECC,[34] on the basis of several concerns, including: (a) HH's control over its own process and the accuracy of information it files; (b) there was no regulatory basis for HH's request under the OEB's rate-setting policies given its rates were set through a cost of service application with annual mechanistic adjustments; and (c) HH had not demonstrated that its financial viability was at risk.[35]

26. In contrast: (a) the CVVA amounts are not the result of any utility error or mistake on the part of the utility (but rather the variance between assumed average customer volumes established in the Board's competitive process and actual customer volumes to date); (b) there is a clear regulatory basis for EPCOR's request (i.e., the generic proceeding which determined customer annual average volume would be a non-competitive element); (c) EPCOR has

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[29] (OEB Decision EB-2017-0045).
[30] SEC Argument, January 27, 2023, p 7 citing OEB Decision and Order (EB-2017-0045), April 26, 2018, p 19-20.
[31] SEC Argument, January 27, 2023, p 7 citing OEB Decision and Order (EB-2017-0045), April 26, 2018, p 20.
[32] SEC Argument, January 27, 2023, p 7.
[33] *Halton Hills Hydro Inc.* (OEB Decision EB-2017-0045), p 17 citing OEB Decision EB-2015-0074.
[34] *Halton Hills Hydro Inc.* (OEB Decision EB-2017-0045), p 17.
[35] *Halton Hills Hydro Inc.* (OEB Decision EB-2017-0045), p 18.

established important and significant financial impairment; and (d) EPCOR is not requesting an increase to its approved revenue requirement.

27. In *Halton Hills*, the OEB found it inappropriate to correct HH's error retroactively.[36] The OEB emphasized that the critical factor for determining whether a regulator is engaging in retroactive ratemaking is the parties' knowledge of whether the rate is subject to future change.[37] The OEB concluded that it had not previously established an expectation that HH's rates for 2016 and 2017 could be subject to change.[38]

28. In contrast, EPCOR's rates are based on the OEB's competitive proceeding – where parties understood that certain cost elements were the risk and responsibility of the utility shareholder (e.g., capital cost for the system) and certain cost elements were simply common *assumptions,* for which the utility would not take risk (e.g., average volumes per customer).[39] EPCOR submits that this allocation of risk was clear and known to EPCOR and customer representatives in advance of the commencement of the 10-year term. For common assumption elements, there had to be some expectation by all stakeholders (including EPCOR and customer representatives) that forecast customer volumes might not prove to be consistent with actual volumes and that rates could vary on that basis. By the same token, customer representatives would not tolerate EPCOR bringing forward an application today seeking to recover capital cost overruns or the revenue impacts of less than anticipated customer connections because these were competitive cost elements identified by the Board in the competitive process. If EPCOR did bring forward such an application, no doubt intervenors would strongly argue that EPCOR has known all along that it was responsible for those cost/revenue risks.

29. EPCOR respectfully submits that the OEB has authority to approve an effective date of January 1, 2021 for the CVVA. There is no express statutory prohibition that compels the

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[36] *Halton Hills Hydro Inc.* (OEB Decision EB-2017-0045), p 20.
[37] *Halton Hills Hydro Inc.* (OEB Decision EB-2017-0045), p 20 citing *Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission),* 2014 ABCA 28, at para 57.
[38] *Halton Hills Hydro Inc.* (OEB Decision EB-2017-0045), p 20.
[39] EPCOR Interrogatory response, December 5, 2022, OEB Staff Question 4; see also, SEC Argument, January 27, 2023, p 3; OEB Staff Submission, January 26, 2023, p 6.

OEB to deny EPCOR's request; rather the OEB may adopt any method or technique that it considers appropriate to set just and reasonable rates. EPCOR has provided financial evidence to establish that a refusal of this request would result in significant financial impairment and amount to the imposition of rates that prevent EPCOR from earning a fair return on its invested capital.

C. EPCOR SHOULD GET FULL RECOVERY OF AMOUNTS RECORDABLE IN THE CVVA

30. EPCOR requests 100% recovery of amounts recordable in the CVVA. In contrast, OEB Staff has indicated that EPCOR should share in the risk of revenue variances resulting from the difference between average forecasted and actual forecasted customer volume.[40] OEB Staff's risk sharing proposal is that EPCOR should only recover 47%[41] of the eventual balances in the CVVA.[42] Meanwhile, VECC and SEC also submit that if a CVVA is approved, EPCOR should share in the burden of revenue shortfalls and each of them has proposed their own alternative risk sharing proposals.[43]

31. For the reasons that follow, EPCOR will explain why 100% recovery is the only appropriate and fair outcome. It is EPCOR's view that any risk sharing mechanism (including those proposed by Board Staff and intervenors) would be inappropriate, unfair to the utility, and not result in rates that are just and reasonable. Imposing a risk sharing mechanism on the CVVA would essentially amount to a review and variance of the Board's decision in the CIP proceeding (i.e., EB-2016-0137/EB-2016-0138/EB-2016-0139). In the event that the OEB determines some form of risk sharing is required, which we don't think it should be, EPCOR has outlined an alternative risk sharing framework that is more responsive to the unique circumstances of this case.

[40] OEB Staff Submission, January 26, 2023, p. 7.
[41] Based on updated data, OEB Staff's risk sharing proposal amounts to a 41% recovery rate for EPCOR.
[42] OEB Staff Submission, January 26, 2023, p. 8.
[43] SEC Submission, January 27, 2023, p.5; VECC Submission,

i) 100% Recovery of CVVA is Consistent with Prior Regulatory Approvals

32. The risk allocation between customers and EPCOR was clearly and definitively set out in the competitive CIP proceeding. The CIP required that average customer volumes for Rates 1 and 6 be a customer risk. Certain other elements that impact revenue requirement were very clearly and definitively EPCOR's risk.

33. EPCOR's Custom IR application perfectly followed the risk allocation set out in the CIP for every element. For example, construction cost overruns experienced on the South Bruce project were EPCOR's risk in the CIP, and EPCOR has honoured that bargain – EPCOR has not brought an application for recovery of those overrun costs. The risk allocation for average customer volumes should be no different.

34. Central to the OEB's decision in EPCOR's Custom IR proceeding was the ongoing consideration and analysis of commitments made in the CIP, including whether an issue was within or outside the scope of the CIP. There was reference to the OEB's decision in the competitive process where it was "expected that EPCOR Southern Bruce's rate application would be consistent with its CIP proposal".[44] Ultimately, the commitments made in the CIP were never meant to be revisited or amended – and EPCOR has not sought to revisit or amend them.[45]

35. Less than 100% recovery of amounts recordable in the CVVA would result in a fundamental inconsistency between existing rates and the approved CIP. EPCOR views any imposition of average annual customer volume risk to EPCOR as changing the rules on EPCOR. More than that, this outcome would undermine the entire CIP process and the basis upon which EPCOR bid for and undertook the construction of the South Bruce utility.

36. In EPCOR's view, there is no option to deny the establishment of a CVVA which fully places the revenue risk associated with average customer volumes back onto the ratepayer as originally intended, just as there is no option for EPCOR to offload revenue risk associated with competitive parameters to South Bruce ratepayers. If the OEB goes down the path of

[44] Southern Bruce Custom IR Application (EB-2018-0264), November 28, 2019, Decision and Order, p.5.
[45] Southern Bruce Custom IR Application (EB-2018-0264), August 20, 2019, Decision on Issues List.

risk sharing for amounts recoverable in the CVVA then this dismantling of the risk allocation framework should go both ways and ultimately expose ratepayers to risk on competitive assumptions. Surely, the OEB does not intend to go down this path and for this reason OEB Staff's proposal for the utility to share in the risk of amounts recoverable through the CVVA is fundamentally flawed and indefensible.

37. The purpose of this Application is to now go through the mechanics of setting up the CVVA. This is happening now because EPCOR and the utility industry generally had limited experience in setting up a greenfield natural gas utility in Southern Ontario from which EPCOR could draw on, and without any data to the contrary, it reasonably expected that forecasted average customer volumes established through the CIP were reliable. EPCOR cannot be faulted for having this expectation; no other party involved in the competitive process thought or could have determined that there was a better average volume number. The reality was that at the time this common assumption was determined, there was no existing gas utility servicing the South Bruce area and as there was no alternative assumption; Union Gas' normalized average for an adjacent service area was deemed an appropriate forecast. No party involved in the competitive proceeding objected to this outcome. Furthermore, it is important to consider that in the first year of operations South Bruce had few customers connected so there was insufficient data incorporating a 12 month usage cycle, until recently, to identify the impact of variances between actual and forecasted customer volumes.

38. Schedule 1 of this Reply Submission outlines the financial outcomes for the utility should the OEB approve 100% recovery of the CVVA. Essentially, EPCOR would receive an average ROE of 0.9% over the ten-year period, which is marginally higher than the -2.5% ROE over the ten-year period if the status quo persists (i.e. no CVVA). This outcome would still result in EPCOR receiving a near zero rate of return. We note that the ROE of 0.9% does not take into account capital cost overruns incurred by EPCOR during the project construction for in scope CIP connection or impacts of delays in customer connection (which were risks assumed by EPCOR).

39. On a final note regarding this issue, VECC has argued that granting the CVVA will change the rate of 0.2209 $\$/m^3$ which EPCOR committed to maintaining for the rate stability period.[46] Although it is true that the 0.2209 $\$/m^3$ rate (which is an average cost over all customer classes, not just Rate 1) would increase if EPCOR was granted 100% recovery of the CVVA, this outcome would be no different had Union Gas been the successful proponent, with the exception that EPCOR would still be the preferred proponent. This is because Union Gas proposed a higher committed rate and it would have utilized its approved NAC variance account to ensure that mass market customers retained full risk for average customer volumes. Furthermore, an increase in the committed rate ultimately does not change EPCOR's approved revenue requirement for the ten-year term.

(ii) All Risk Sharing Proposals are Flawed and Should be Disregarded

40. Although it is EPCOR's position that there shouldn't be any risk sharing for amounts recoverable under the CVVA, it will nonetheless comment on the shortcomings of the proposals set out by OEB Staff, SEC and VECC.

41. OEB Staff's risk sharing proposal is based on the notion that EPCOR has deprived Rate 1 and 6 customers who connected during the 2019-2022 period of a comprehensive understanding of the changes to the rates that they may experience during the ten-year rate stability period.[47] In other words, there is an assertion that early customers signed up for gas service without notice of potential costs associated with average customer volumes.

42. As previously stated in paragraph 28, these customers received notice of average customer volume risk during the competitive process wherein ratepayers had the benefit of representation from a number of intervenor groups.[48] In any event, OEB Staff's rationale regarding customer notice is difficult to reconcile with the reality of customer conversion decision-making. It is questionable that the establishment of an average volume variance account alone (one of several components of distribution rates) whose balances would have

[46] VECC Submission, January 26, 2023, p. 9.
[47] OEB Staff Submission, January 26, 2023, p. 7.
[48] The following parties received intervenor status in the competitive proceeding which evaluated competing CIPs to expand natural gas service to South Bruce: SEC, VECC, Anwaatin, Consumers Council of Canada, Greenfield Specialty Alcohols Inc., Northeast Midstream LP, and representatives of the Southern Bruce communities, Procedural Order No. 5, April 20, 2017, EB-2016-0137/0138/0139.

been expected to be zero until recently, would play such a critical role if at all in the average customer deciding whether or not to convert to natural gas. In making a conversion decision, one might expect a customer to consider things such as commodity cost projections, the cost of making the required equipment modifications or replacements to convert to natural gas, and any applicable gas connection fees.

43. Also, if the underlying intent of OEB Staff's risk sharing proposal is to neutralize the perceived lack of notice to customers who connected from 2019-2022, then there is overreach in respect of customers who will connect after January 1, 2023. Under this proposal, any customer who connects to the system, regardless of when they connect during the ten-year term, will receive a 59% reduction in revenue risk.

44. In terms of the mechanics of this proposal, OEB Staff requested that if EPCOR has more accurate figures than the current and forecasted customer counts, that it should provide those figures in this reply submission. Accordingly, EPCOR submits updated calculations enclosed as Schedule 1, which are based on 3,412 Rate 1 and 6 customers actually connected by the end of 2022 and a total of 6,051 Rate 1 and 6 customers forecasted to be connected by the end of 2028. These updates are the result of an increase in connections at the end of 2022 which were beyond the forecast used in the CIP. The customer forecasts for 2026-2028 are based on 0.75% organic growth annually. This results in a recovery allocation to EPCOR of 41% compared with 47% set out in the OEB Staff Submission.

45. The OEB Staff Submission somewhat downplays the resulting adverse financial impacts to EPCOR arising from this shared risk proposal. In fact, the proposed recovery of 41% is quite problematic. This proposal would commit EPCOR to an ROE of -1.1% over the ten-year term (see Schedule 1), which is not only a devastating financial outcome but also a clear indication as to why the utility would then be limited in its ability to continue to build out the South Bruce distribution system.

46. SEC and VECC have each proposed risk sharing mechanisms that are impractical or lack a principled basis for approval.

47. SEC's proposed risk sharing is similar to the OEB's policy regarding recovery of the impacts arising from Covid-19.[49] Under this approach the OEB would require a 50/50 split of financial risk between customers and the utility for costs below the deadband amounts of 300 basis points. The 300 basis points deadband would be calculated as a comparison between earnings with and without the CVVA, the mechanism would be symmetrical and risk sharing would be on a rate class specific basis.[50]

48. Notably, the OEB determined that the Covid-19 deferral account guidelines upon which the above-noted risk sharing approach is based, was not approved for greenfield utilities such as EPCOR's South Bruce operation. In reaching this conclusion, the OEB stated that due to the unique circumstances of greenfield utilities, a generic application of the guidelines would be impractical.[51]

49. In the present case, SEC's risk sharing mechanism is equally impractical. The mechanics of this proposal fail to account for the unique circumstances of EPCOR's greenfield utility including that a significant portion of forecasted customers for the entire rate stability period have yet to connect, that prior regulatory approvals fully allocated the risk of average customer volumes to Rate 1 and 6 customers and that the utility is currently in a position of chronic under-earning that is not sustainable. EPCOR has calculated that SEC's proposal works out to approximately a 35% recovery of amounts recordable in the CVVA and would not reasonably addresses the significant financial impairment faced by the utility.

50. VECC has generally stated that it does not oppose OEB Staff's proposal but would like to see a different allocation that weighs more heavily on the shareholder.[52] VECC has also suggested that that the OEB could (a) allocate a 50/50 sharing of both the benefits and costs as between customers and the utility but that the utility should be obligated to spend 10-20% of its share on building load to mitigate the need for the CVVA, or (b) tie the CVVA to the actual returns of the utility such as an approach with respect to the Covid-19 account

[49] SEC Submission, January 27, 2023, p. 5.
[50] SEC Submission, January 27, 2023, p. 6.
[51] OEB Letter to Parties re: Consultation on the Deferral Account – Impacts Arising from the Covid-19 Emergency (EB-2020-0133), April 13, 2021.
[52] VECC Submission, January 27, 2023, p. 11

although based on a floor as opposed to a band.[53] These vague proposals lack a principled approach, lack the same crucial considerations missing in the SEC proposal and fail to recognize that EPCOR is naturally motivated, in perpetuity, to attach as many customers as possible and to get them to maximize their use of gas where practical.

(iv) EPCOR's "In the Alternative" Approach to Risk Sharing

51. As previously stated, EPCOR strongly objects to the concept of risk sharing in respect of average customer volumes as this fundamentally contradicts the ten-year regulatory compact it signed on to.

52. Going down the path of approving any risk sharing mechanism is problematic. In particular, the following regulatory risks are worth considering:

    1. **Approval of a risk sharing approach would essentially amount to a review and variance of a prior Board decision (the CIP proceeding) which emphasized that rates must be consistent with the approved CIP.** Risk sharing would result in a material change to the general parameters which were the backbone of the CIP. Essentially, in addition to competitive parameters and common assumptions, a hybrid risk-sharing category would emerge that was never contemplated when the ten-year regulatory compact was made. EPCOR's regulatory pact would shift from assuming 0% revenue risk for average customer volumes to potentially absorbing a majority of the risk; 61% in the case of OEB Staff's updated proposal.

    2. **A risk sharing approach will adversely impact EPCOR's financial position resulting in financial harm to the utility that will endure over the ten-year term and limit its ability to earn a fair return on its investment or expand the system.[54]** As previously stated, there is a public interest in EPCOR's ability to realize a fair and reasonable return on its investment. Company evidence has been provided on financial impacts to the utility in the event that total recovery of the

[53] *Ibid*.
[54] See EPCOR Argument in Chief, January 9, 2023, paragraph 10(c); See also Schedule 1, EPCOR Reply Submission.

CVVA is not approved, including that the Brockton expansion is contingent on the outcome of this application.

3. **A risk sharing approach would result in an unfair/inequitable outcome.** The package of competitive parameters and common assumptions approved in the competitive process struck a balance between the interests of ratepayers and the utility. To date, South Bruce ratepayers have benefitted from the competitive aspects of the OEB's competitive process – by avoiding capital cost overruns and customer attachment risk. In turn, it is only fair for EPCOR to receive the benefit of common assumptions and obtain a result where ratepayers assume the full responsibility of risk associated with annual average consumption.

53. However, in the event that the OEB decides to impose a risk sharing framework for amounts recorded in the CVVA, then EPCOR submits that the mechanism should adequately reflect the following: (a) recognition that the utility is not at fault for the variances between forecasted and actual average customer volumes, and (b) a fairer compromise that more reasonably reflects the OEB's prior decision on risk allocation for average customer volume.

54. EPCOR submits that the starting point for determining the proportion of the risk borne by EPCOR should be to identify the number of customers consuming gas by the end of August 2022, which is the month after the OEB hearing notification was sent out regarding this Application. As of the end of August 2022, there were 2,547 customers, which amounts to 42% of total projected customers within the rate stability period ending in 2028.

55. The apportionment of risk as between EPCOR and those customers who connected to South Bruce from 2019-August 31, 2022 would be shared on a 50/50 split for the duration of the rate term (i.e. until December 31, 2028), consistent with the OEB policy that is used to share the impacts of changes in tax legislation in between filing periods. Although the present circumstances are not the outcome of a change in legislation, this 50/50 split approach accounts for an unanticipated variance for which no party is at fault and therefore splits the impacts evenly as between the utility and ratepayer. In the present case, neither EPCOR nor current customers are at fault for the variance in forecasted versus actual

average customer volumes. Risk sharing would not apply to customers who connected after September 1, 2022, which is one month after the OEB issued a hearing notification to all intervenors in the 2019-2028 Custom IR proceeding regarding the bifurcation of EPCOR's Custom IR application in order to address the proposal to establish a CVVA as phase 2 of the proceeding. For customers who connect from September 1, 2022-December 31, 2028, the risk allocation approved by the competitive process would apply without variation.. In other words, these customers would accept 100% of the risk associated with average customer volumes for the remainder of the rate term.

56. Under this model, EPCOR would recover 79% of amounts recordable in the CVVA throughout the entire rate stability period resulting in an average ROE of 0.2% as opposed to 0.9% (an ROE of 0.9% occurs if the CVVA is 100% recoverable). Table 1: below illustrates the proposed methodology.

Table 1: EPCOR RISK SHARING MODEL

Customer Connections	**Connections**		**Recovery Allocation**		**Risk Allocation**
	Count	**% of Total**	**Customer**	**ENGLP**	
2019-Aug 2022 Connections	2,547	42%	21%	**21%**	50/50 shared (ending 2028)
Sep 2022-2028 Connections	3,504	58%	0%	**58%**	100% Customer
Total Projected 2028 Connections	6,051	100%	21%	**79%**	

57. EPCOR has also prepared a table which provides an overview of the resulting average ROEs based on various scenarios including the OEB Staff risk sharing proposal, EPCOR's alternative proposal and outcomes with or without the CVVA. This table is attached as Schedule 1 to this Reply Submission.

E. APPLICABILITY OF THE CVVA TO EXPANSIONS OF THE SOUTH BRUCE SYSTEM

58. OEB Staff has submitted that the applicability of the CVVA should be limited to the current South Bruce distribution system that underpinned EPCOR's Custom IR application and that for future community expansions, including Brockton, EPCOR would need to seek the necessary rate approvals at the time it seeks leave to construct approval for the community expansion.[55] SEC has made a similar argument.[56]

59. EPCOR was awarded a grant from the Ontario Government to expand the South Bruce utility into Brockton. This grant was applied for on the basis of South Bruce rates. EPCOR has stated in responses to interrogatories that in applying for this grant, it was required to use a common assumption for annual customer consumption of 2,200m^3 and without access to the CVVA, this community expansion would become uneconomic.[57]

60. EPCOR opposes a geographically restricted CVVA and respectfully submits that in the context of a typical system expansion, a variance account such as the proposed CVVA runs with the utility. The Brockton expansion is merely an extension off the same steel pipe from Dornoch which forms part of the existing system into the new communities being served. Brockton will be part of the South Bruce utility with the same upstream storage account, M12 rate and gas supplier.

61. Since the Brockton expansion is a normal system expansion with a 10-year customer connection forecast of 500, it is simply administratively inefficient, costly and unnecessary to start parceling out the system into different rates.

62. The Brockton expansion has a forecasted in-service date of Q3 2024; therefore, there can be no doubt that all prospective customers for this project would connect to the system well after (a) the establishment of the CVVA, and (b) receipt of any prospective customer communications regarding this variance account. In these circumstances, where a variance

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[55] OEB Staff Submission, January 26, 2023, p. 13.
[56] SEC Submission, January 27, 2023, p. 7.
[57] EPCOR IR Response to Staff 3K.

account is established prior to the project expansion, EPCOR's view is that it should be permitted to recover 100% of amounts recorded in the CVVA for all prospective Brockton customers. We note that that these forecasted 500 customers have not been included in the projected 2028 customer counts in Table 1 or Schedule 1 of this Reply Submission.

F. RATE SMOOTHING AND CUSTOMER COMMUNICATIONS

63. OEB Staff has submitted at a rate smoothing proposal should be filed in the first application that EPCOR seeks disposition of the CVVA balance if the total annual bill impact, including the recovery of CVVA balances, is greater than 10%.[58] EPCOR recognizes the importance or rate smoothing in this context and supports OEB Staff's request.

64. The parties in this proceeding also made submissions on the issue of existing and future customer communications. Notably, OEB Staff has proposed that in all communications targeting prospective customers, EPCOR should provide forecast delivery costs inclusive of the impact of the CVVA.[59] EPCOR recognizes the importance of communications to prospective customers regarding the impact of the CVVA and supports OEB Staff's request.

G. RELIEF REQUESTED

65. EPCOR respectfully requests that the OEB approve the proposed CVVA, including the utility's proposed allocation and disposition methodologies, as amended, in this proceeding.

All of which is respectfully submitted this 13th day of February 2023.

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[58] OEB Staff Submission, January 26, 2023, p. 12.
[59] Supra, p. 13.